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# The γραφή μοιχείας in Athenian legal procedure

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## 1. Introduction

In a previous publication I have argued that there is not a single unified definition of adultery in Athenian law, but rather that the laws which defined and dealt with extramarital affairs in the classical period were a compilation of statutes from a time span of 250 years, each introduced for different purposes<sup>1</sup>. Christopher Carey independently reached similar conclusions in an article published in the same year<sup>2</sup>. On account of this fragmentation we are left with some uncertainty regarding certain aspects of *moicheia* in Athenian law. The central text from the homicide law of Drakon, as quoted by Demosthenes, was never intended to define adultery, but only to empower the *kyrios* to deal with the seducer directly, without the interference of potentially partial and corrupt magistrates<sup>3</sup>. However, as it remained valid for centuries after its introduction, along with the rest of the homicide laws of Drakon, it ended up defining adultery in Athenian law<sup>4</sup>, and all

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1. For the entire discussion see K. KAPPARIS, "When were the Athenian adultery laws introduced?", *RIDA*, 42 (1995), p. 97–122; E. CANTARELLA, "Moicheia e omicidio legittimo in diritto attico", *Labeo: rassegna di diritto romano* 18 (1972), p. 78–88, and also "Moicheia: Reconsidering a Problem", *Symposion 1990*, p. 289–296; L. FOXHALL, "Response to Eva Cantarella", *Symposion 1990*, p. 297–304; D. OGDEN, "Rape, adultery and the protection of bloodlines in classical Athens", in S. DEACY – Karen F. PIERCE (ed.), *Rape in antiquity*, Swansea, 1997, p. 25–41; W. SCHMITZ, "Der nomos moicheias: das athenische Gesetz über den Ehebruch", *ZRG* 114 (1997), p. 45–140.
  2. C. CAREY, "Rape And Adultery In Athenian Law", *CQ* 45 (1995), p. 407: "Legislative measures belonging to different periods are likely to present themselves as the result of an integrated design rather than the product of accretion. Finally, and most importantly our, sources, distort."
  3. In the aristocratic state of Drakon, where the power and offices of the state were the exclusive privilege of an elite, one can imagine that for a low class man to seek redress from an aristocrat for the seduction of one of the women in his household would be a real challenge, if not outright impossible. Drakon, aware of this, bypassed the state magistrates in several cases allowing the victim self-help and the ability to take direct action.
  4. D. COHEN, "The Athenian Law Of Adultery", *RIDA* 31 (1984), p. 147–165 has argued that this law never provided the definition of adultery, and that adultery was always limited to a breach of the marital bond. The objections of Cohen were accepted by S. TODD (*The Shape of Athenian*

other statutes dealing with various aspects of *moicheia* took the definition which it established for granted:

D. 23.53: ΝΟΜΟΣ. Ἐάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελῶν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ’ ἀδελφῆ ἢ ἐπὶ θυγατρὶ, ἢ ἐπὶ παλλακῆ ἢν ἂν ἐπ’ ἐλευθέροις παισὶν ἔχη, τούτων ἕνεκα μὴ φεύγειν κτείναντα.

“If someone kills another unintentionally, in the street or accidentally at war, or caught in bed with his wife, mother, sister, daughter, or concubine whom he keeps for the birth of free offspring, the killer is not to be punished in these cases.”

The precise meaning of the key preposition ἐπὶ (+ δάμαρτι or μητρὶ etc.), has caused considerable controversy. Eva Cantarella, under the influence of Roman law, has argued for a literal interpretation of the phrase: ἐπὶ should be understood as actually meaning “on top of”. The *kyrios* of the woman only had the right to kill in those cases where someone had been caught ἄρθρα ἐν ἄρθροισι ἔχων “limbs into limbs”, a phrase of Lucian (*Eun.* 10), which she understands as the precise definition of adultery as a crime. She also refers to the narrative of Lysias 1, *On the Murder of Eratosthenes*, where Euphiletos goes to great lengths to explain to the jury how Eratosthenes was caught naked in bed with the wife of Euphiletos. Lin Foxhall in her response to Eva Cantarella was skeptical, and this skepticism has prevailed in subsequent literature<sup>5</sup>. In a previous publication I argued against too narrow an understanding of *moicheia* citing evidence from passages like the novel of Achilles Tatius, *Leukippe and Kleitophon*, where the mere presence of Kleitophon in the women’s quarters with Melite, fully dressed and with no sexual chemistry between them, is taken as evidence of adultery by the husband, who orders his slaves to seize Kleitophon and tie him up as an adulterer<sup>6</sup>. In one extreme instance, where a litigant is accused of whispering an erotic message into the ear of his alleged mistress on her wedding day, he admits that if he had done so, he would deserve to be killed by her *kyrios* on the spot. The passage suggests that a mere whisper in the ear of a respectable woman could constitute adultery (see the discussion on the case of Lykophron below). Likewise in a passage from the novel of Chariton Chaireas and Kallirhoe even a guarded letter, which may or may not be innocent, could seemingly constitute proof of adultery. The issue whether one could make accusations of adultery in those cases where someone had not been caught in the act on the basis of circumstantial evidence is one that has not been discussed in the

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*Law*, Oxford, 1993, p. 277–278), but effectively refuted by C. CAREY (n. 1), p. 407–417, on the grounds that the evidence from the sources is indisputable. I have also taken the same view as Carey (K. KAPPARIS, *Apollodoros ‘Against Neaira’ [D. 59]: Edited with introduction, translation and Commentary*, Berlin, 1999, p. 295–300). The fact that in the two major instances of adultery known to us this law was applied, in Lysias 1.30–31 by building the entire case around it, and in D. 59.63–70 through its application to a non-marital case, can only be taken as evidence that this law defined adultery and applied to all free women under the protection of the *kyrios*.

5. CANTARELLA (n. 1); FOXHALL (n. 1).

6. Achilles Tatius 5.23.3. See my previous discussion in KAPPARIS (n. 1), p. 105–108.

literature, understandably so, since the evidence for it is rather sparse and elusive. However, the question is important for our entire understanding of μοιχεία in Athenian law and merits some discussion.

Two passages casually mention that it was possible for a cuckolded husband, or the kyrios of an unmarried woman to seek redress from a man who had seduced her but was not caught in the act. The first is a passing reference in the *Athenaion Politeia*, that the thesmothetai accepted γραφὰς μοιχείας, the other is a more significant but equally unhelpful passage in the speech of Hypereides *Against Lykophron*<sup>7</sup>. In it the defendant complains that his opponent did not introduce a *graphe* to the *thesmothetai*, even though he was making allegations about the seduction of free women; instead, he introduced an *eisangelia* contrary to the laws, for two reasons, first because this way there was no risk to him<sup>8</sup>, and second because this procedure enabled him to make wild allegations, as if the entire case were a tragedy to be presented on stage. The implication is that in a regular *graphe moicheias* it would have been necessary for his opponent to be less dramatic and more factual, or else risk a fine of 1000 drachmas if he failed to convince at least 20% of the jury. These two references, vague as they may be, suggest that the injured kyrios, or any other man on his behalf, could submit a public persecution for *moicheia*<sup>9</sup>.

An additional reason why one might want to bring such a prosecution would be the attempt to cast doubt upon the legitimacy of an heir, by suggesting that he or she was the fruit of an adulterous relationship. One can recall the famous historical incident, where Agesilaos II succeeded on the throne of the Eurypontid line in Sparta, when Leotychidas, the son and heir of king Agis II was declared illegitimate, because allegedly his mother was suspected of adultery with Alcibiades

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7. Arist. *Ath. Pol.* 59.4: εἰσὶ δὲ καὶ γραφαὶ πρὸς αὐτοὺς ... καὶ μοιχείας (“One can bring a *graphe* to them [the thesmothetai] for ... and adultery”). Hyp. Lyc. 10: αὐ[τὸς] δ’ ὑπερπηδήσ[ας] ἅπ[αν]τας τοὺς νόμους εἰσαγγελία[ν δέδ]ωκας ὑπὲρ ὧν [γρα]φαὶ πρὸς τοὺςθεσ[μοθ]έτας ἐκ τῶν νόμ[ων] εἰσίν, ἵνα π[ρ]ῶτον μ[ὲν] ἀκίνδ[υνος] εἰσ[ί]της εἰς τὸ [ν] ἄγωνα, [ἐπε]ίτ[ε] α[ὐ]τὸς ἐξ[ῆ]μι σοι τραγ[ο]μῆδ[ι]ας γρ[α]φῆ[ι]ς εἰς τῆ[ν] εἰσαγγελί[αν] οἷας [περ] νῦν γέγρα[φ]ας (“You bypassed all the laws and introduced an *eisangelia* for matters for which the law permits regular indictments [*graphai*] to the thesmothetai, first in order to introduce this case without danger to yourself, and second in order to be able to include in the *eisangelia* all these tragedies which you have now written”).
  8. This is typically taken as an indication that the case was introduced to court before 330, when the Athenians changed the law and thereafter a prosecutor who did not obtain 1/5 of the votes was fined 1000 drachmas (18.250). See the discussion in D.PHILLIPS, “Why was Lycophron prosecuted by *eisangelia*?”, *GRBS* 46, p. 376–381. The discussion on the date is not important for our argument.
  9. However, this interpretation of the Aristotelian reference is not inevitable. The *Athenaion Politeia* could just as easily be referring to another statute somehow related to *moicheia*, like for example the law on unlawful confinement under allegations of adultery, which was a *γραφὴ* submitted to the *thesmothetai* (D. 59.66).

during his stay in Sparta<sup>10</sup>. In a real court setting, this was undoubtedly a primary motive behind the case against Lykophron (see the discussion below), and Stephen Todd has suggested that the γραφή μοιχείας was generally used for cases when someone tried to surreptitiously pass an illegitimate child as the son of a citizen<sup>11</sup>. However, it is noteworthy that in several such cases attested in the Attic orators, the γραφή μοιχείας was never used, probably because it was too risky and difficult to prove, compared with other procedures available for such cases<sup>12</sup>. Moreover, even a successful outcome in a γραφή μοιχείας could ultimately be inconsequential in an inheritance dispute, as it could not have any binding effect on anything related to the disputed property *per se*. It could only be seen as a prelude which might help the subsequent litigation on the inheritance, and even then one would need to establish a direct link between the extramarital affair and the heir, which in itself would be no small feat in many cases. Athenian law had more direct avenues for claiming an inheritance, like the *diadikasia*.

My purpose in this study is to explore the elusive evidence from the two instances where accusations of adultery were made, but no prior arrest *flagrante delicto* had taken place. I will compare their testimony with that of other, better-attested instances of *moicheia* and attempt to draw some conclusions about the possible arguments and tactics that could be used in such a case, and the difficulties and pitfalls which the litigants faced. Ultimately I will attempt to assess the overall viability of such prosecutions and answer the question whether the absence of firm evidence on cases introduced to court through a γραφή μοιχείας should be considered merely an accident of transmission, or there is another explanation related to the chances of success of such cases in a real court setting, assessed against the risks run by the prosecutor who failed to secure one fifth of the votes.

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10. X. *H.G.* 3.3; Plu. *Lys.* 22. Without a doubt this cynical power game succeeded because Agesilaos had the support of his lover Lysander, when the latter was at the height of his power and was seeking to influence Spartan politics by installing a puppet king on the throne of Sparta. In a real, democratic court setting such tactics were less likely to be successful.
  11. TODD (n. 4), 111.
  12. In Is. 12, where the accusers of Euphiletos alleged that he was not legitimately born in the family, the process was an *epheisis* after a *diapsephisis*. In *Against Neaira* the prosecution was made according to the law which forbade citizens to marry aliens and pretend to have legitimate children with them. In Is. 6, where Euktemon tries to pass the child of the libertine Alke as his own, his adult son Philoktemon simply blocks the boy's adoption to the phratry, and so on. Athenian law had a range of more effective and less dangerous paths to block the acceptance of illegitimate brood into the citizen body that the γραφή μοιχείας. Even in the one attested case where allegations of adultery were used to illegitimize, and consequently exclude from the line of succession the heir apparent, it is interesting to see that the γραφή μοιχείας was never used, because it was deemed too dangerous, and an *eisangelia* was used in its place (Hyp. *Lyc.* 7).

## 2. The *eisangelia* against Lykophron

There is only one real case in our sources widely believed to be a prosecution for adultery brought against a man who at the time of his prosecution was not even in Athens, but had been living on the island of Lemnos for the past three years, serving there as *hipparchos*<sup>13</sup>. The accusations made against Lykophron in his absence alleged improprieties that happened before his departure, for which the accused clearly had not been caught in the act. A reference to a pregnancy during a divorce and to a child, which was obviously born after the divorce<sup>14</sup>, may suggest that the true motive of the indictment was to change the line of succession of the estate of Charippos, the husband of the woman with whom allegedly Lykophron had the affair. If the natural heir of his fortune were to be declared illegitimate, this would allow other relatives to lay claim on the inheritance<sup>15</sup>.

We have fragments from the prosecution speech by Lykourgos, mostly in the form of citations from lexicographers, and a sizeable papyrus fragment from the defense speech by Hypereides. The case was certainly an *eisangeleia*<sup>16</sup>, introduced by Ariston with Lykourgos as his *synegoros*<sup>17</sup>. The extant fragments from the prosecution speech offer very little help for our understanding of the case.

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13. Hyp. *Lyc* 14: ἔπειτα εἰς Λήμνον ἵππαρχον (ὕμεῖς ἐχειροτονήσατε), καὶ ἦρξα μὲν αὐτόθι δὺ' ἔτη τῶν πώποθ' ἵππαρχηκότων μόνος, προσκατέμεινα δὲ αὐτόθι τὸν τρίτον ἐνιαυτόν ("Then you elected me to serve as leader of the cavalry in Lemnos, and I held this position for two years, which was unprecedented among cavalry leaders, and then I stayed for a third year").
  14. Hyp. *Lyc* 4.47. This reference seems to suggest that Lykophron had an affair with the wife of Charippos. When the latter found out, he divorced his wife while she was still pregnant. Thus he implicitly, if not explicitly recognized the illegitimacy of the child. However, a similar case in D.59.50–61 suggests caution; there the husband divorces his pregnant wife, but then acknowledges and legitimizes the child once it was born. If anything, quite possibly the same thing happened here too, and this is why the relatives who would benefit if the child could not inherit, brought this lawsuit as a step towards disputing its legitimacy. But an *eisangelia* for a case like this would be a massive overkill, even considering the blatant misuse of the procedure for a variety of lawsuits around the time of this trial. A private lawsuit, like that questioning the legitimacy of Phile the daughter of Pyrrhos in Is. 3, would be more appropriate, and perhaps this is one of the reasons why the defendant claims that *eisangelia* was the wrong procedure for the case.
  15. It must be stressed that even if Lykophron lost, this did not automatically make the heir of Charippos illegitimate. One would need either to successfully prevent the boy from registering with the deme when he reached his 18<sup>th</sup> year, or to use the argument of illegitimacy in order to build a credible claim to the inheritance in a separate lawsuit, as it happens in Isaios 3, when Phile's legitimacy comes into question.
  16. Hyp. *Lyc* 4.47.9: ἐ[ν τῆι ἐ]ἰσαγγελίαι γράφει]
  17. A few sources seem to imply that there were two speeches against Lykophron. However an *eisangelia* was a public lawsuit, and only one longer speech would be needed. It would be reasonable to suggest that Lykourgos wrote two speeches, one for Ariston and one for himself, as his *synegoros*, and the two of them shared the time allocated to the prosecution, just as Lykophron shared the time allocated to the defense with Theophilos. In later times occasionally grammarians and rhetoricians treated the two parts of the prosecution speech as two different

However, one citation is important as it quite likely summarizes the main charge against Lykophron:

Λυκοῦργος ἐν τῷ Κατὰ Λυκόφρονος· <οὐ γὰρ ὅσιον <τὸν> τοὺς γεγραμμένους νόμους, δι' ὧν ἡ δημοκρατία σῶζεται, παραβαίνοντα, ἐτέρων δὲ μοχθηρῶν εἰσηγητῆν ἐθῶν καὶ νομοθέτην γενόμενον ἀτιμώρητον ἀφεῖναι.><sup>18</sup>

“Lucurgus in the speech *Against Lykophron*: It is not consonant with divine law to leave unpunished the man who has broken the written laws, which preserve democracy, why it has become the introducer of the new sinister customs and laws”.

This citation seems to provide the grounds for the *eisangelia* prosecution. The accusation seemingly was that with his conduct Lykophron had undermined the democratic constitution, subverted the written laws of the city, and was introducing new, base laws and standards. The primary accusation had to be of such magnitude because the primary purpose of *eisangelia* was to address subversive activity against the democratic constitution, treason, or corrupt political influence, and in order to be able to fit whatever specific charges the prosecutor made against Lykophron into this legal framework he needed to be able to argue that his actions had a deleterious effect upon the city as a whole. This is confirmed by an incomplete sentence containing the response of Lykophron along the same lines:

ἢ νεωρίων προδοσίαν ἢ ἀρχαίων ἐμπυρισμὸν ἢ κατάληψιν ἄκρας<sup>19</sup>

“Either betrayal of the docks, or arson of the ancients, or seizure of the Acropolis”.

Further down Lykophron objects to these accusations:

ἐμὲ μὲν αἰτιάι ἐν τῇ εἰσαγγελίᾳ καταλύειν τὸν δῆμον παραβαίν[ον]τα τοὺς νόμους<sup>20</sup>.

“He is accusing me in the *eisangelia* that I am subverting the democracy by breaking the laws”.

Lykophron mentions that the *eisangelia* law applied to such serious offenses, which he will argue that he has not committed, and this is why the entire process is flawed. Beyond that, what were the specific accusations and whether they could be fitted into the legal framework of *eisangelia* are more difficult to ascertain. While it appears that one of the primary charges against Lykophron was adultery, he had never been caught *flagrante delicto* with the wife of Charippos, and he never had to face the more direct threats of the Drakonian law, such as instant execution or confinement under accusations of adultery. The affair allegedly had taken place three years before the introduction of this case to court, and the accusation of

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speeches. Harpocration sometimes treats the speech as one (e.g. s.v. πεφασμένης), and sometimes as two (e.g. s.v. ἱπνός, and s.v. ὄρκάνη). Hereafter I will treat them as one.

18. Lyc. Fr. 10–11,2, Conomis.

19. Hyp. Lyc. 3.45.

20. Hyp. Lyc. 10

adultery was based on two circumstantial pieces of evidence. One was that a wall leading into the house of Charippos had been breached. The prosecution explained this as an attempt by Lykophron to gain entry into the house illicitly, and have sexual relations with the wife of Charippos. The second piece of evidence was an allegation that Lykophron whispered into the ear of the wife of Charippos on her wedding day, during the bridal procession, that she should not consummate the marriage with her husband, but save herself for him.

In the extant text of Hypereides we find Lykophron responding only to the second charge. He argues that it is completely ludicrous; no one could possibly believe that in the presence of so many people someone would dare to approach a respectable woman on her wedding day and whisper in her ear an improper message. Interestingly he adds that if the woman's kyrios had overheard him say this, he would be completely justified to kill him on the spot. Then he challenges the jury to convict him for all the other offenses, if they believe that there is any truth in this preposterous charge of adultery. In the surviving section there is no response to the charge about the digging through the wall, but one would imagine that this too could be very easily refuted. Since no one was caught digging, a hole in the wall was meaningless as evidence for anything. With such weak evidence to support the accusations of his prosecutors, Hypereides has no difficulty brushing off the adultery charges effectively in just a few sentences.

If indeed this was the main charge, and on account of this Lykourgos was claiming that Lykophron was a threat for the democratic constitution, either he vastly overestimated his own rhetorical prowess, remarkable as this may have been, or he applied a definition to *eisangelia* so broad that almost any offense could have been tried under it. David Phillips is convinced that it is the latter<sup>21</sup>. He has argued that Lykourgos was applying too broad a definition to *eisangelia*, and that this was consonant with his tactics, as these are known from other cases, and contemporary practice in the 330's<sup>22</sup>, when this procedure was used for a wide variety of offenses. While Phillips is correct about the misuse of *eisangelia* around the middle of the 4<sup>th</sup> c., still it would be very difficult to imagine that a jury could be persuaded about the adultery accusations on the basis of such slender and questionable evidence, never mind the much more serious charges, like the intent to subvert the city and the laws. What makes the credibility of such charges even shakier is the fact that they were leveled against a person who had been absent from the city for quite a while. At the danger of overstating the obvious, it would be very difficult to argue that a man who intended to overthrow the democracy and subvert the laws had chosen to live in an island which was a three-day journey away from Athens, taking no part in public life for years.

21. PHILLIPS (n. 7), p. 375–394.

22. The precise date of this case is a contentious issue, but this controversy does not concern us here; see PHILLIPS (n. 7) and D. WHITEHEAD, *Hypereides: the forensic speeches*, Oxford, 2000, p. 78–82 for the details and relevant literature.

One additional argument which Hypereides develops in defense of his client is based on character. Lykophron argues that it is most unlikely for a man who has never before seduced respectable women to start doing so in the age of 50<sup>23</sup>. Lykophron reminds the jury that he has led a blameless life without ever being prosecuted for anything, and that he has never brought charges against another citizen. We recognize a familiar topic in this statement: the orator wants to draw attention to the difference between himself and his accusers. While they are constantly engaging in blackmail and sycophantic activities for profit<sup>24</sup>, he has been an exemplary citizen.

His opponents quite likely did not agree that he has led a blameless life until now, because they were alleging that he was the reason why many women were still unmarried and turning into spinsters, hoping in vain that he would marry them. They also alleged that he had many affairs with women already married<sup>25</sup>. However, it is certain that no names or specifics were given at this point. Lykophron challenges his opponent to give specifics or accept the fact that without evidence his allegations were nothing more than unfounded slander. In this case we do not know whom the jury chose to believe, but from the perspective of an independent observer these allegations seem to be slanderous and empty, underlining further the weakness of the adultery case against Lykophron<sup>26</sup>.

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23. Hyp. *Lyc.* 13. Lykophron argues that those who are engaging in illegal and sordid activities, do so throughout their entire lives; they do not wait until their fifties to get started.
24. Hyp. *Lyc.* 2: τοιοῦτο γάρ ἐστι τὸ Ἀρίστ[ωνος τουτουῖ πρᾶγμα· [οὗτος προσκαλεῖται μὲν περιῶν πά[ντας ἀνθρώπους, τῶν δ' ὅσοι μὲν [ἂν μὴ διδώσιν αὐ[τῷ ἀργύριον, κρίν[ει καὶ κατηγορεῖ, ὅπ[όσοι δ' ἂν ἐθέλωσι] ἀποτίνειν, ἀφήσιν] (“This is what Ariston does. He goes around and blackmails everyone, and then brings judgments and prosecutions against those who do not give him any money. However, those who are willing to pay him off, he leaves undisturbed”).
25. The concept of the serial seducer of many women appears also in *Lysias* 1.16: Ἐρατοσθένης Ὁῆθεν ὁ ταῦτα πράττων, ὃς οὐ μόνον τὴν σὴν γυναῖκα διέφθαρκεν ἀλλὰ καὶ ἄλλας πολλὰς· ταύτην γὰρ [τὴν] τέχνην ἔχει (“Eratosthenes from Oe is the man doing this, who has not only corrupted your wife, but many others too; this is his occupation”).
26. Hyp. *Lyc.* 11: ἄλλην μὲν οὐδεμίαν τῶν ἐν τῇ πόλει γυναῖκα ἔχεις εἰπεῖν (“You cannot name any other woman in the city [except the wife of Charippos]”). It is understandable that the prosecutors will not be able to produce witnesses at this point, even if they were telling the truth, because incriminating testimonies would expose the women by law compell their husbands to divorce them (D. 59.87). Both sides are aware of this, and both try to use it to their advantage. The prosecutors can make otherwise unsubstantiated allegations, while the defense in the absence of witnesses will say that these allegations cannot be taken seriously. Aeschines builds the entire persecution of Timarchos on this principle, stating that cannot present witnesses because no one would testify (1.45), and expects the jury to believe him and trust his words. It is noteworthy that, for whatever reasons, Aeschines won that trial despite the fact that he had absolutely no witnesses for almost everything he was accusing Timarchos. In this light the complete absence of witnesses in support of the allegations of the prosecutors that Lykophron had been a serial seducer of women, although significant, does not necessarily mean that the jury would unquestionably side with Lykophron.

If the prosecutors of Lykophron had such great difficulty proving the adultery accusations, the prospect of a jury finding Lykophron guilty of plotting against the democracy and the laws on the basis of this evidence seems remote. This is why I find it very difficult to believe that adultery was the main charge in this case, and I am inclined to think that, as it often happened with public lawsuits, adultery was only one in a long list of accusations. A few clues in the speech of Hypereides lead to this conclusion and may suggest that the seduction of respectable women was not even the main thrust of the case against Lykophron. Repeatedly he refers to the “other charges”, making them sound a lot more serious than the adultery issue, which he downgrades to nothing more than hearsay<sup>27</sup>. Given the size of the extant fragment we should expect that most of the speech which he delivered was devoted to the refutation of those other charges. His accusers were saying that his conduct had endangered the laws and the democratic constitution, and expectedly they should have offered something more than some meek, poorly constructed, and unsubstantiated adultery allegations. It is difficult to tell from the existing fragments what the specifics of such allegations could have been, but ultimately it is not important for our argument. What matters for our purposes is that the prosecutors of Lykophron tried to pin on him charges about an adulterous affair for which he had never been caught in the act, and which had happened long before this case came to court. In itself this confirms that charges of adultery could be brought at a later stage, but also underlines the difficulty of proving such allegations.

### 3. The trial of Mithridates for adultery

Equally elusive, but in some ways significant is the passage from the novel of Chariton *Chaireas and Kallirhoe*, which describes a charge of adultery brought against someone, even though he had not been caught having sex with the woman. In this case sexual activity had not even taken place, but there was proof of ill intent on behalf of the seducer in the form of a letter, at least according to the prosecutor in a famous trial scene from book 5, which is pivotal for the plot of the novel. Of course, the case is fictional while the novel was composed in Roman times (probably in the 1<sup>st</sup> c. BC) in a place far away from Athens (Aphrodisias, in Asia Minor), and it must be treated with extreme caution as a source for the legal history of classical Athens. However, as Konstantin Doulamis has convincingly demonstrated, the trial scene of book 5 is heavily borrowing from the Attic Orators by closely imitating themes and *topoi* from several authors, while it is profoundly

27. Hyp. Lyc. 4: εἰ ἔστιν τ[αῦ]τα ἀληθῆ, ὁμολ[ογ]ῶ καὶ τᾶλλα πάν[τα] π[ε]ποιηκέναι τὰ [ἐν τῇ εἰσαγγελίᾳ γε]γραμμένα· (“If this is true [the adultery charge], I confess that I have committed all the other crimes written in the *eisangelia*”). Hyp. Lyc. 3: τὴν τε εἰσαγ[γ]ελίαν καὶ τὰς αἰτίας, ἃς ἐν τῇ ἐκκλησίᾳ ἠτιάσαντό με, ὅτε τὴν εἰσαγγελί[α]ν ἐδίδοσ[α]ν (the *eisangelia*, and the accusations which they brought against me in the Assembly, when they introduced the *eisangelia*”).

aware of the classical rhetorical tradition<sup>28</sup>. In this respect the arguments employed by the litigants in the trial scene of Chariton to some degree could be echoing a rationale which would be in place in an Athenian court, and it can provide us with some insights, a window into how a case like this could have been argued before an Athenian court, allowing us to consider some possible legal and rhetorical points which could help us with our investigation. Regardless of its possible echoes of classical themes the trial scene in Chariton is intriguing and explores some interesting legal questions. It is a case for adultery based on nothing more than what appears to be an incriminating, even if ambiguous love letter.

The trial takes place in the Persian court before the Great King Artaxerxes and had been initiated through a complaint by Dionysios, a Milesian nobleman and current husband of the beautiful Kallirhoe. He alleges that his opponent, Mithridates, the satrap of Caria, attempted to seduce his wife through a letter, and is certain that his intention was that of a *μοιχός*. He therefore reports Mithridates to the Satrap of Lydia Pharnakes, who brings the matter to the attention of the Great King. A territorial clash of male egos for the beautiful Kallirhoe will fully unfold in a trial taking place in the Persian court<sup>29</sup>. Both men are summoned to Babylon and the hearing for the case takes the familiar format of a Greek trial, with the one significant difference that the decision rests with Artaxerxes. Cécile Daude in a significant article on the persona of Artaxerxes has argued that he is portrayed as an exotic ruler and a conqueror in love, in a happy fusion of historiography and romance<sup>30</sup>. This fusion of fundamentally antithetical qualities like oriental despotism and Greek rule of law, or royal authority with a trial by jury is critically important for the advancement of the plot at this point. The crowd present reacts

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28. K. DOULAMIS, "Forensic oratory and rhetorical theory in Chariton book 5", in K. DOULAMIS, (ed.), *Echoing Narratives: Studies of Intertextuality in Greek and Roman Prose Fiction (Ancient Narrative Supplementum 13)*, Groningen, 2011, p. 21–48; see also K. KAPPARIS, "Has Chariton read Lysias I 'On the murder of Eratosthenes'?", *Hermes* 128 (2000), p. 80–83; J.R. PORTER, "Adultery by the book: Lysias I (*On the murder of Eratosthenes*) and comic diegesis", *EMC* 16 (1997), p. 433–440, and also "Chariton and Lysias I: further considerations", *Hermes* 131 (2003), p. 433–440; M. LAPLACE, "Le roman de Chariton et la tradition de l'éloquence et de la rhétorique : constitution d'un discours panégyrique", *RhM* 140 (1997), p. 38–71; C. HERNÁNDEZ LARA, *Estudios sobre et aticismo de Caritón de Afrodísias (Classical and Byzantine monographs 29)*, Amsterdam, 1994, p. 267–274; S. SMITH, *Greek identity and the Athenian past in Chariton: the romance of empire (Ancient narrative Supplementum 9)*, Eelde, 2007; S. TILG, *Chariton of Aphrodisias and the invention of the Greek love novel*, Oxford, 2010.
29. See the useful studies of M. JONES, "«Andreia» and gender in the Greek novels", in J.R. MORGAN – M. JONES (ed.), *Philosophical Presences in the Ancient Novel (Ancient Narrative Supplementum 10)*, Groningen, 2007, p. 111–135 and J. SCOURFIELD, "Anger and gender in Chariton's «Chaereas and Callirhoe»", *YCIS* 32 (2003), p. 163–184, for the role of gender and masculinity in the Greek novel.
30. C. DAUDE, "Le personnage d'Artaxerxès dans le roman de Chariton, «Chairéas et Callirhoé»: fiction et histoire", in B. POUADERON, C. HUNZINGER, D. KASPRZYK (ed.), *Les personnages du roman grec. Collection de la Maison de l'Orient Méditerranéen*, 29 (Série littéraire et philosophique 7), Lyon, 2001, p. 137–148.

like a jury and the King unquestionably embodies the voice of that popular jury. Several times the reader is told that those present are deciding the case and “voting” on it, even though there was no formal vote of any kind and only the king’s opinion mattered in the end: (5.6.11: Ταῦτα εἰπὼν ὁ Διονύσιος παρώξυνε τοὺς ἀκούοντας καὶ εὐθὺς εἶχε τὴν ψῆφον. “Dionysios with these words provoked the listeners and immediately carried the vote”).

Other similarities to a Greek style trial include two speeches of equal length, one for each litigant, as well as the customary *topoi* that we find in Attic forensic oratory<sup>31</sup>. The speeches of the two men are shorter than they would be in a real trial. However, since the reader knows all the details there would be no point for extensive speeches. The reader is also aware that neither man is entirely right or entirely wrong; each one of them is only partly right.

The event which offset the trial was a letter which Mithridates sent to Kallirhoe to tell her that her first husband Chaireas, whom she thought to be dead, was actually alive. The motives of Mithridates were not entirely pure; jealousy because Dionysios had married Kallirhoe, the woman with whom he was secretly in love, played a big part. The reappearance of her first husband, with whom Kallirhoe had never ceased to be in love, meant that she could not continue to be married to Dionysios since she was already married to someone else. Whatever the motives of Mithridates, the actual content of the letter was truthful, since the reports about the death of Chaireas had been inaccurate. The reader knows for sure that Chaireas was alive, and that Mithridates was planning to present him in the flesh before the Great King, at the most critical point of the trial. Dionysios intercepted the letter and misread the intention of it, as he was certain that Chaireas had died. This is how he describes his interpretation of the letter:

5.6.6–8: Μιθριδάτης οὖν ἐν Μιλήτῳ γενόμενος καὶ θεασάμενός μου τὴν γυναῖκα διὰ τὸ τῆς ξενίας δίκαιον, τὰ μετὰ ταῦτα οὐκ ἔπραξεν οὔτε ὡς φίλος οὔτε ὡς ἀνὴρ σώφρων καὶ κόσμιος... ἀλλ’ ἀσελγῆς ὄφθη καὶ τυραννικός. ἐπιστάμενος δὲ τὴν

31. For example: the speech of Dionysios opens with the very familiar *captatio benevolentiae*, where the litigant attempts to establish a bond with the jury through flattery of their fairness, wisdom and rectitude, and his own gratitude (χάρις) for these qualities (e.g. Isoc. 19.2; D. 25.37; 28.24 *al.*). We find *amplificatio* in the following lines, where the present dispute is elevated into an issue that concerns personally the Great King himself, whom Mithridates has offended with his behavior. The topic of the trial as an ἀγών for the greatest and most important things seems to be a direct adaptation of the closing lines of Lysias 1: ἐγὼ γὰρ νῦν καὶ περὶ τοῦ σώματος καὶ περὶ τῶν χρημάτων καὶ περὶ τῶν ἄλλων ἀπάντων κινδυνεύω (“for I now am facing mortal danger for my life, my property, and everything else”), only for Dionysios the greatest peril is threatening his wife, ἀλλὰ εἰς τὸ τιμιώτερον ἐμοὶ σώματός τε καὶ ψυχῆς, τὴν γυναῖκα (5.6.2: “my wife who is more precious to me than my life, and my soul”). Then we encounter the familiar assertion that the litigant has faith in the jury, because his cause is just (e.g. Isoc. 15, 322; Hyp. *Epit.* 1). The list goes on but suffice to say that both the speeches of Dionysios and Mithridates are modeled on Attic law court speeches, with which the readers of Chariton would be very familiar, since of these texts were widely used in his day as educational tools in the numerous schools of the Empire. See also DOULAMIS (n. 27), p. 21–48.

σωφροσύνην καὶ φιλανδρίαν τῆς γυναικὸς λόγοις μὲν ἢ χρήμασι πείσαι αὐτὴν ἀδύνατον ἔδοξε, τέχνην δὲ ἐξεύρεν ἐπιβουλῆς, ὡς ᾤετο, πιθανωτάτην· τὸν γὰρ πρότερον αὐτῆς ἄνδρα Χαιρέαν ὑπεκρίνατο ζῆν καὶ πλάσας ἐπιστολάς ἐπὶ τῷ ὀνόματι τῷ ἐκείνου πρὸς Καλλιρόην ἔπεμψε διὰ δούλων. ἡ δὲ σὴ, Τύχη βασιλέα ἄξιον ὄντα κατέστησε καὶ <ἡ> πρόνοια τῶν ἄλλων θεῶν φανεράς ἐποίησε τὰς ἐπιστολάς.

“Mithridates coming to Miletus and seeing my wife as it was appropriate for a visitor, after that he did not act like a friend or a wise and prudent man..., but he turned out to be shameless and arrogant. Because he knew how modest and devoted to her husband my wife was, he thought that it would be impossible to seduce her with words or money, and came up with this malicious trickery, which seemed to him to have a much better chance of success. He pretended that her former husband Chaireas was alive and made-up letters in his name and sent them to Kallirhoe through servants. But your Fortune made you a worthy King, and the providence of the other gods brought the letters to the light.”

Dionysios alleges that the ultimate motive of Mithridates was to tear Kallirhoe away from her husband, before he even attempted to make her his own, because he knew that she was so virtuous that she would never commit adultery. From Dionysios’ perspective the false news about Chaireas was only the first act in a plot by Mithridates to separate him from his wife and then seduce her, and this is why he is accusing him of adultery. The fact that the seduction had not been completed is less important for the injured husband than the ill-intent of a powerful man towards his wife, and this is why he immediately takes steps to put a stop to his malicious plan, and seeks the punishment of Mithridates, for being an adulterer so shameless that he would be lying about a dead man to his widow<sup>32</sup>. The evidence which Dionysios produces in support of his position is simple and compelling:

5.6.9–10: αἱ δὲ ἀποδείξεις ἄφουκτοι· δεῖ γὰρ δυοῖν θάτερον, ἢ Χαιρέαν ζῆν, ἢ Μιθριδάτην ἠλέγχθαι μοιχόν. Καὶ γὰρ οὐδὲ τοῦτο δύναται λέγειν, ὅτι τεθνηκέναι Χαιρέαν ἠγνόει· τούτου γὰρ ἐν Μιλήτῳ παρόντος ἐχῶσαμεν ἐκείνῳ τὸν τάφον, καὶ συνεπένθησεν ἡμῖν. Ἄλλ’ ὅταν μοιχεῦσαι θέλῃ Μιθριδάτης, ἀνίστησι τοὺς νεκρούς.

“The proof is inescapable, because it is one of these two: either Chaireas is alive, or Mithridates has been proven to be an adulterer. He cannot even claim that he was unaware of the death of Chaireas, because when he was present in Miletus he dedicated a grave to him and he participated in the mourning. When Mithridates wants to commit adultery he even raises the dead.”

Since it seems unlikely that Mithridates will be able to produce a dead man, the audience and the King himself are almost convinced about the guilt of Mithridates. The narrative thus far suggests that it might be possible to successfully introduce a

32. 5.6.10: λόγισαι δέ, βασιλεῦ, πῶς ἀναίσχυντός ἐστι μοιχός, ὅπου καὶ νεκροῦ καταφεύδεται (“Consider this, king, how shameless an adulterer he is, when he is even lying about a dead man”).

case of adultery to court on the basis of circumstantial evidence alone and without the need to catch someone in the act. However, even though in theory this sounds plausible, the complete absence of any such evidence in the entire body of classical Athenian literature may not be accidental, especially when compared to numerous references speaking about catching the adulterer in the act. The response of Mithridates to the accusations may explain why catching the offender would be the only way to make sure that he would not escape punishment.

First of all, Mithridates argues that an adultery case should not be admissible (μη εισαγωγίμος) because Kallirhoe was not really the lawful wife of Dionysios, but a mere slave, whom he bought and then elevated in status<sup>33</sup>. This line of defense sounds very familiar. In the speech *Against Neaira*, when Epainetos was accused of *moicheia* with the unmarried daughter of Stephanos, in his defense he responded that the laws on *moicheia* did not apply in this case because the woman was practicing prostitution, and as such she was excluded from the force of the adultery laws<sup>34</sup>. This argument of Mithridates will become particularly poignant in the following scenes where the first husband of Kallirhoe will appear, proving Mithridates right in his contention that this woman could not be the wife of Dionysios. However, Mithridates knows that from a legal point of view this argument is far-fetched if one were to consider that Kallirhoe was a freeborn Greek woman in the first place, and that all Dionysios had done was to liberate and marry her (under the false impression that her first husband was already dead). This is why Mithridates rather than continue with this line of defense, he concedes the point; from now on he says that he will treat Kallirhoe as if she were a Milesian woman and the lawful wife of Dionysios, and proceeds to respond to the actual allegations of adultery.

His next point is very significant for our purposes: he challenges the allegations by asking Dionysios to produce proof of the crime, because, he says, the law does

33. γυναίκα τολμᾶς ὀνομάζειν, ἦν ἀπέδοτό σοι ταλάντου Θήρων ὁ ληστής, κάκεινος ἀρπάσας ἐκ τάφου; ἀλλὰ φησὶν ἔλευθέραν οὖσαν ἐπριάμην. οὐκοῦν ἀνδραποδιστὴς εἶ σὺ καὶ οὐκ ἀνὴρ (“You dare to call your wife the woman that Theron the pirate sold you for a talent [a rather exorbitant sum for a mere slave], whom himself had stolen from a grave? ‘But’ he says ‘I bought her as a free woman.’ But then you are a slave merchant and not a husband”).

34. D. 59.67: καὶ ὠμολόγει μὲν χρῆσθαι τῇ ἀνθρώπῳ, οὐ μέντοι μοιχός γε εἶναι. οὐτε γὰρ Στεφάνου θυγατέρα αὐτὴν εἶναι ἀλλὰ Νεαίρας, τὴν τε μητέρα αὐτῆς συνειδέναι πλησιάζουσαν αὐτῷ, ἀνηλωκέναι τε πολλὰ εἰς αὐτάς, τρέφειν τε ὅποτε ἐπιδημήσειεν, τὴν οἰκίαν ὅλην· τὸν τε νόμον ἐπὶ τούτοις παρεχόμενος, ὃς οὐκ ἔᾶ ἐπὶ ταύτῃ μοιχὸν λαβεῖν ὅποσαι ἂν ἐπ’ ἐργαστηρίου καθῶνται ἢ πωλῶνται ἀποπεφασμένως, ἐργαστήριον φάσκων καὶ τοῦτο εἶναι, τὴν Στεφάνου οἰκίαν, καὶ τὴν ἐργασίαν ταύτην εἶναι, καὶ ἀπὸ τούτων αὐτοὺς εὐπορεῖν μάλιστα (“He admitted using the woman but not that he was an adulterer, because she was not the daughter of Stephanos but Neaira’s, and her mother was aware that she was having relations with him, and he had spent a lot of money on them and maintained the entire household when he was staying with them. He produced the law on the subject, which forbids accusations of adultery with one of those women established in brothels or visibly practicing any form of prostitution, claiming that this place too, the house of Stephanos, was a brothel, and this was the trade, and they prospered greatly from it”). See also the discussion in KAPPARIS (n. 12), com. *ad loc.*

not punish intent or crimes possibly to be committed in the future; it punishes crimes already committed, and if Mithridates is to be punished Dionysios needs to prove that he has committed adultery with his wife. This proof is not to be found in empty letters in the absence of criminal actions:

5.7.5–6: πρῶτον μὲν γὰρ οὐ γενομένην, ἀλλ' ὡς μέλλουσιν μοιχείαν ἐγκαλεῖ, καὶ πρᾶξιν οὐκ ἔχων εἰπεῖν ἀναγινώσκει γραμμάτια κενά. Τὰς δὲ τιμωρίας οἱ νόμοι τῶν ἔργων λαμβάνουσι.

“In the first place he is making accusations of adultery that hasn’t happened but may happen in the future, and since he cannot refer to any action he is reading empty letters. However, the laws punish actions.”

This argument underlines with sufficient clarity why it would be imperative to catch the offenders committing the crime. Without proof that adultery had been committed Dionysios could not realistically hope to win the case on the grounds of future or potential adultery.

The standards of proof in the ancient world may have been more open to the jury’s interpretation than in a modern trial, but still, some proof that illicit acts had actually taken place would be necessary. It is unlikely that unproven innuendos, suspicions and accusations about adulterous intent without any shred of actual proof of illicit acts to which both sides had consented<sup>35</sup> could sway a jury and secure a conviction. In fact, in the two cases of adultery from the classical period which are described in considerable detail it is evident that a more rigorous standard of proof than suspicions, ill-intent, or unproven innuendos was needed. It would not be enough for Euphiletos to know that his wife was having an affair, nor his suspicions when he saw her wearing makeup even though still in mourning for the death of her brother, or when he heard banging doors in the middle of the night could prove anything. In order to prove that his wife was having an affair he needed to catch Eratosthenes in the house with her, and this is why he patiently staged the arrest with the help of the maid. Likewise, it was never enough for Stefanos to know that Epainetos had seduced his daughter. Very clearly he could not even try to extract money from Epainetos (which was his ultimate objective) without hard proof that illicit acts had taken place, and this is why he stages an occasion

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35. Although E. HARRIS, “Did the Athenians regard seduction as a worse crime than rape?”, *CQ* 40 (1990), p. 370–377, has suggested that rape could have the same penalties as adultery, the subsequent studies of Carey (n. 2), p. 407–417 and R. OMITOWOJU, *Rape and the politics of consent in classical Athens*, Cambridge 2002, correctly emphasize the differences between the two offenses. The pains to which Euphiletos goes to explain to the jury that his wife had consented to the affair underlines the importance of consent on behalf of the woman before accusations of adultery could be made, and likewise in the second significant source of the adultery laws from the classical period, the speech *Against Neaira*, Apollodoros goes to great lengths to explain how Phano had been seduced by Epainetos, a mature man who was frequently visiting their house bringing rich gifts and offering affection to the lonely young woman. Her consent to the affair, even though according to Apollodoros everything had been orchestrated by her parents, was still critically important before accusations of adultery could be made.

in the country which would allow him to catch Epainetos with his daughter, and then entrap him as an adulterer and secure the promise of a substantial sum of money under sureties. In the light of this the phrase μοιχόν ἀλίσκειν means to catch an adulterer redhanded, and I am not aware of a single instance where it could unambiguously indicate to convict someone as an adulterer in court.

#### 4. Conclusions

Although the case against Lykophron supports the passage of the *Athenaion Politeia* and suggests that charges for adultery could be brought after the event, and without the requirement of an arrest in the act, it also explains why in the two attested cases from the classical period both Euphiletos and Stephanos went to great lengths to catch the offenders in the act. The narrative from the trial in Chariton's book 5 corroborates this conclusion and adds some intriguing insights to the slim evidence from classical sources. The existing evidence suggests that proof of sexual acts which had already taken place (and not of possible or future acts) would be essential for the build up of the case. Without this kind of proof the prosecutor ran the significant risk of failing to carry more than 20% of the jury with all subsequent penalties. The cases against Lykophron and Mithridates expose the inherent difficulties of proving adultery on the basis of circumstantial evidence and probably explain why, even though the γραφή μοιχείας existed as a theoretical possibility, there is no attested case ever been brought to court under this procedure, and why in the two extensive narratives of adultery in the Attic Orators (*Lysias 1* and *D. 59 Against Neaira*) the *kyrios* of a woman suspected of committing adultery has gone to great lengths in order to set a trap and catch the lovers in the act. After an arrest *flagrante delicto* the power overwhelmingly shifted towards the *kyrios* and gave him the opportunity to avenge his family's honor, and maybe even secure a handsome financial reward, instead of engaging in lengthy, uncertain and ultimately risky litigation. While we can understand why the lawgiver considered the γραφή μοιχείας to be a necessary procedure and introduced it in the statute books, we can also understand why in practical terms it would be difficult to prove, dangerous and on the whole unappealing. For a cuckolded husband the mere thought that in addition to the injury to his manhood and his *oikos*, he could be facing a huge fine and disfranchisement should be sufficient to discourage him from bringing a γραφή μοιχείας, and perhaps try a different, safer procedure, as Lykourgos did in the case *Against Lykophron*.





# RIDA

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